Canada. Canadian Radio-Television Commission

Notice of Public Hearing

BACKGROUND NOTES ON THE PROPOSED AMENDMENTS TO THE CRIMINAL CODE, THE CANADA EVIDENCE ACT AND THE PAROLE ACT (BILL C-51)

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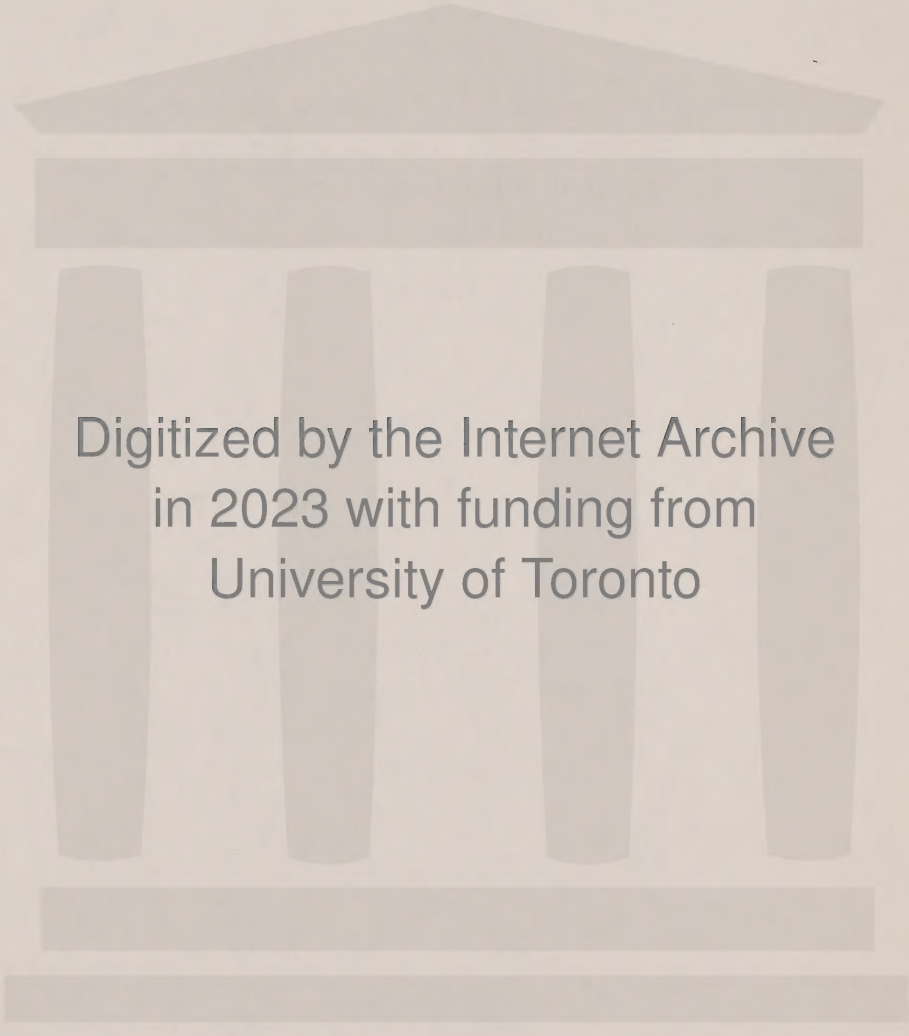

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Within this paper, an explanation of the content of each of these sections will be made, followed by an analysis of the subject matter.

PART I - AMENDMENTS TO THE CRIMINAL CODE

1) OBSCENITY/PORNOGRAPHY (CLAUSES 18 and 19)

a) EXPLANATION

The Criminal Code offence of corrupting morals--obscenity is contained in section 159. The section is sufficiently complex to warrant its reproduction here:

Offences Tending to Corrupt Morals

CORRUPTING MORALS—Idem—Defence of public good—Question of law and question of fact—Motives irrelevant—Ignorance of nature no defence—"Crime comic"—"Obscene".

159. (1) Every one commits an offence who

(a) **makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or**

(b) **makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.**

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

(b) publicly exhibits a disgusting object or an indecent show,

(c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious, or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene. 1953-54, c. 51, s. 150; 1959, c. 41, s. 11.

18. Subsection 159(8) of the said Act is repealed and the following substituted therefor:

Where matter or thing is obscene

"(8) For the purposes of this Act, a matter or thing is obscene where

(*a*) a dominant characteristic of the matter or thing is the undue exploitation of sex, violence, crime, horror, cruelty or the undue degradation of the human person; or

(*b*) the matter or thing unduly depicts a totally or partially nude child

(i) engaged or participating in an act or a simulated act of masturbation, sexual intercourse, gross indecency, buggery or bestiality, or

(ii) unduly displaying any portion of his or her body in a sexually suggestive manner.

Definition of "child"

(9) In this section, "child" means a person who is or appears to be under the age of sixteen years.

Forfeiture

159.1 In any proceedings under section 159, where a court is satisfied that a matter or thing is obscene and at any material time was being kept for any purpose prohibited by that section, it shall order the matter or thing to be forfeited to Her Majesty in right of the province in which the proceedings took place, for disposal as the Attorney General may direct."

Clause 18 of Bill C-51 would introduce a wider definition of "obscenity" for the purposes of the Criminal Code. The undue exploitation of violence and the depiction of children in pornographic material would be obscene for the purposes of charges involving obscenity.

The definition of obscenity presently included in the Code provides that the undue exploitation of crime, horror, cruelty or violence is obscene only when depicted in conjunction with sex. The new definition of obscenity would continue to include any matter or thing a dominant characteristic of which is the undue exploitation of sex. For the first time, a matter or thing a dominant characteristic of which is violence, crime, horror, cruelty or the undue degradation of the human person would be considered obscene. The undue depiction of a totally or partially nude child engaged in one of the enumerated sex acts and the undue display of any portion of a child's body in a sexually suggestive manner would also be obscene. For the purposes of the proposed definition, a "child" would be anyone who is or

appears to be under the age of sixteen.

The new definition would apply to the activities presently prohibited under section 159 (corrupting morals--obscenity) as well as to other sections of the Code which refer to obscenity. Under the amended section 159 the making, printing, publishing, distribution, circulation, sale and exposure to public view of obscene matter or things, as well as the possession of such material for any of these purposes would remain illegal. The words "matter or thing" would include written matter, pictures, models, phonograph records and other materials.

It should be noted that the defence of public good, presently contained in sub-section 159(3), would be retained. As a result, a matter or thing the dominant characteristic of which is the undue exploitation of sex, crime, violence, etc. would not be considered obscene where it is established that the public good was served by the material. The effect of subsection 159(3) is to provide an opportunity for the court to take into consideration the artistic merit and any other socially redeeming qualities of potentially obscene material. Where the public good is

found to be served by the matter or thing in question, a conviction under section 159 will not result

The proposed section 159.1 would require the court to order forfeiture of obscene matters or things. The provincial Attorney General would have control over what was done with material that had been seized and forfeited.

The offence of mailing obscene matter would be retained in the Criminal Code and the amendment proposed in clause 19 would introduce a mandatory requirement that the court order forfeiture of obscene, indecent, immoral or scurrilous material upon a conviction for mailing obscene matter. The provincial Attorney General would determine how the seized material would be disposed of.

The maximum penalty of two years imprisonment provided by section 165 would apply to the offences of tied sale (section 161), restriction on publication of reports of judicial proceedings (section 162), immoral theatrical performance (section 163) and mailing obscene matter (section 164). The maximum penalty for a conviction for corrupting morals--

19. Sections 164 and 165 of the said Act are repealed and the following substituted therefor:

Mailing obscene matter

"**164.** (1) Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection 162(4).

Forfeiture

(2) Where an accused is convicted of an offence under subsection (1), the court that convicts the accused shall order any matter or thing found to be obscene, indecent, immoral or scurrilous to be forfeited to Her Majesty in right of the province in which the proceedings took place, for disposal as the Attorney General may direct.

Punishment

165. Every one who commits an offence under section 161, 162, 163 or 164 is guilty of

(*a*) an indictable offence and is liable to imprisonment for two years, or

(*b*) an offence punishable on summary conviction.

Idem

165.1 Every one who commits an offence under section 159 is guilty of

(*a*) an indictable offence and is liable to imprisonment for ten years or to a fine not exceeding one hundred thousand dollars or to both; or

(*b*) an offence punishable on summary conviction."

obscenity under section 159 would be changed from two to ten years imprisonment by section 165.1. Fines of up to $100,000 would also be established.

b) ANALYSIS

The proposed amendments expand the interpretation of obscenity to include, besides the undue exploitation of sex, the undue exploitation of violence, crime, horror, or cruelty. Previously these latter categories were only considered obscene under the law if they were accompanied by sex. If we assume that it is the proper function of law to restrict the publication and distribution of obscene material and things, then such material most certainly should not be limited to material of a sexual nature and this is a significant amendment. In addition, a new category has been included in the definition - "the undue degradation of the human person". This category is somewhat different than the others in that the form of the degradation might also be included in the other categories specified.

It is unclear how the term "undue degradation" will be interpreted.

Prior to an evaluation of the proposed amendments, the purpose of the involvement of criminal law in censorship must be determined. To justify state intervention through law in an area, there must be a clear rationale that the act being prohibited is harmful to someone and that the loss of freedom which results from invoking the law is not a greater injustice than the protection it provides. The Law Reform Commission of Canada in its working paper, Limits of Criminal Law: Obscenity, a Test Case, argued that there are two areas which may lend themselves to the use of the criminal law in the area of obscenity. One is

involuntary exposure to obscenity and the second is the exposure of children to obscenity. In the former case, the reasoning is that public obscenity is a nuisance which makes life less tolerable because it annoys, disgusts and offends in a manner similar to loud noises and nauseating smells (which are against the law). Involuntary exposure to material which one finds objectionable should not be confused with the existence of such material to which an individual may choose to expose her/himself. In the case of children, they should be protected because they do not yet have the maturity to choose their own priorities and make their own decisions, or to differentiate for themselves between what is desirable and undesirable.

Beyond these two goals of obscenity laws, the arguments to restrict certain materials or things become problematic. As a general principle, one has to assume that adults are capable of determining what they find distasteful and unacceptable and will not expose themselves to things which they find offensive. It is a form of paternalism to assume that legislators are better able than the individual to make such decisions.

Simply because one person or even the majority of people find certain material or things distasteful is not sufficient reason to deny the privacy and freedom of others to live their lives as they choose, as long as no harm to another results.

One of the reasons that has been suggested in support of censorship of pornography is that the behaviour it depicts is either unacceptable or undesirable. The argument is that the depiction of such behaviour will lead people to assume that such behaviour is acceptable and desirable and will encourage them to act in that way. It is justifiable in a democratic society to suppress material if it <u>incites</u> people to act in a manner that will be harmful to others.

The suppression of pornography on this basis would be questionable, however.

It has generally been found that obscene material or things, far from having an independent effect on behaviour, do little more than reflect existing behaviour patterns. There are no studies which definitively indicate that the representation of "sex, violence, crime, horror, or the undue degradation of the human person" leads to participation in such forms of behaviour. Onus must be placed on advocates of increased legal restrictions to show that there is a direct relationship between the exposure of an individual to such material and the nature of subsequent behaviour by that individual. Until this is found, the use of criminal law, our most extreme measure of social control, is not justifiable.

Suppressing obscenity, regardless of definition, may be interpreted as championing the sensibilities, tastes, and ideas of one person over another. But one of the realities of modern industrial society is that it is composed of a vast array of people with a wide variety of ideas. Basic democratic principles, in upholding the rights of freedom, privacy and human dignity, acknowledge the value of such diversity, and so perhaps should obscenity laws.

Another reason that has been advanced in support of restrictive obscenity laws is that pornography may depict behaviour which occurs, but of which we disapprove. It is argued that by suppressing such material, social behaviour can be changed.

The inequality of women, the existence of violence, and the expression of horror and cruelty will not be solved by suppressing their depiction. They will be solved by other less superficial measures such as education, equitable social programmes, and control of gun sales. If we follow the argument (as adopted by the Parliamentary Committee on Justice in its recent report on obscenity) that the portrayal of women in pornography degrades women, and that this justifies censorship, we should also be ready to legally restrict the publication and distribution of the vast majority of elementary school textbooks which also depict sexual victimization and inequality and thereby also degrade women. The real problem is not the depiction of women in pornography but the fact that women are not accorded equal economic, social, and legal status in our society.

To deny freedom of expression and access to such expression without first ensuring equal status through other less restrictive measures such as equal pay for work of equal value, equal pension benefits, equitable matrimonial rights and so on, is to do nothing more than to accord the state a blanket right of censorship. Until mechanisms to ensure equal status for women, which do not involve restrictions on personal freedom have been tried, it cannot be considered legitimate for the state to enact means that do involve such restrictions.

Laws restricting pornography, contrary to popular belief, may serve to enforce cultural taboos against women and sexuality by implying that women as a class are a different and unequal group. They may also, by making sexual pornographic depictions covert, suggest that in fact the inequality existant in our society is no longer a reality. Camouflaging the realities of human behaviour does not change the behaviour, it simply means that people are less often exposed to it or confronted by it on a

general level and that they may privatize individual discriminatory experience and accept it as inevitable. A number of books on the history of women's rights have suggested that the traditional segregation of women in the home was a primary reason why it took so long for women to recognize their low status and to organize themselves to pressure for equal rights.

There are two other important issues which raise questions about the use of the criminal law to suppress obscenity. One is determining the mechanisms whereby it can be decided that a matter or thing is or is not obscene and will or will not be censored. The second is whether such a law can be enforced. Is it likely that by attempting to repress such material we will be doing little more than providing a new area of covert behaviour, possibly to be controlled by those who already operate illegitimate businesses in our society? Also, will the means required (possibly mail opening, searching individual homes, etc.) make the enforcement of the law itself unmanageable? There is not enough experience or research to determine answers to these questions at the present time and they are raised here only as possibilities, the validity of which needs to be tested.

One does not have to enjoy, to like, or to approve of "obscene" matter or things. And one should have the right not to be exposed to such things. But to interfere with the right of others to see or have such matter, in private, may set a dangerous precedent, and could result in an undue restriction of personal freedom.

More research must be carried out and more thought must be given to this area to evaluate both present and proposed laws and their effect on the status of women.

2) PROCURING (CLAUSE 20)

a) EXPLANATION

Clause 20 would widen the offence of procuring the sexual misconduct or defilement of children. Section 166, which prohibits parents and guardians from procuring the sexual misconduct or defilement of female children, would be amended so as to protect male and female children equally. In this context the word "procure" may be taken to mean "arrange". The application of the maximum penalties for the offence would also be changed. The maximum of fourteen years imprisonment presently applies only when the person in question is under the age of fourteen. The amendment would make that sentence applicable in cases when the person is under the age of sixteen. A maximum of five years imprisonment would apply when the person was sixteen years of age or older.

A new offence would be created by the proposed section 166.1. Under that section, it would be an offence for any person who is not the parent or guardian of a person under the age of sixteen to procure his or her sexual misconduct or defilement. The maximum penalty for the proposed offence would be fourteen years imprisonment.

20. Section 166 of the said Act is repealed and the following substituted therefor:

Parent or guardian procuring defilement

"**166.** Every one who, being the parent or guardian of a person,

(*a*) procures that person to have illicit sexual intercourse with a person other than the procurer, or

(*b*) orders, is party to, permits or knowingly receives the avails of, the defilement, seduction or prostitution of that person,

is guilty of an indictable offence and is liable to

(*c*) imprisonment for fourteen years, if that person is under the age of sixteen years, or

(*d*) imprisonment for five years, if that person is sixteen years of age or more.

Person procuring defilement

166.1 Every one who, not being the parent or guardian of a person under the age of sixteen years,

(*a*) procures that person to have illicit sexual intercourse with a person other than the procurer, or

(*b*) orders, is party to, permits or knowingly receives the avails of, the sexual misconduct, defilement, seduction or prostitution of that person,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Belief as to age not material

166.2 For the purpose of proceedings under sections 166 and 166.1, it is not material whether the accused believed that the person in relation to whom the offence was committed was sixteen years of age or more."

The activities prohibited by sections 166 and 166.1 would include procuring a person to have illicit sexual intercourse with a person other than the procurer, and ordering, being party to or knowingly receiving the avails of sexual misconduct, defilement, seduction or prostitution of a person.

The proposed section 166.2 provides that, for the purposes of a charge of a parent, guardian or other person procuring the sexual misconduct or defilement of a person, it is the person's actual age that is relevant. An honest belief on the part of the procurer that the person was not within the prohibited age category would be irrelevant, and the offence would be committed as long as the child was, in fact, within the prohibited age group. It is interesting to note that the word "person" in section 166 (parent or guardian procuring defilement) is not defined and no age limit is specified. This could lead to the conclusion that the section prohibits a parent or guardian from procuring the defilement of a child of any age.

b) ANALYSIS

In expanding this section to include male children as well as female, an anomaly that has existed in the Criminal Code is removed. It is a legitimate goal for the criminal law to be

used when an action results in persons being coerced into behaviour which they have not chosen themselves. Extending such protection to all children, regardless of sex, acknowledges the right to protection from such forced behaviour, and acknowledges the need for the protection of children on the basis of their inability to provide informed consent due to immaturity.

Setting the age to which this legal prohibition applies at 16 years may or may not be appropriate. Any age limit which is imposed will likely be arbitrary and no one is yet able to say with any precision, particularly in matters of sexuality, at what age a child has the maturity to make informed and reasoned decisions about her/his own behaviour. A static age limit will inevitably include some who are mature enough and others who are not. Such determination of age needs to be debated by the public and should be consistently applied to the age restrictions in the Criminal Code.

3) LOITERING IN PUBLIC AREAS (CLAUSE 21)

a) EXPLANATION

21. Paragraph 175(1)(*e*) of the said Act is repealed and the following substituted therefor:

"(*e*) having at any time been convicted of an offence under a provision mentioned in paragraph 687(*b*), is found loitering or wandering in or near a school ground, playground, public park or bathing area."

The amendment in clause 21 is made necessary by other amendments and does not change the substance of the offence of vagrancy under paragraph 175(1)(e). Under this paragraph, presuming that Bill C-52 (proposed legislation on indecent assault) is enacted, it would be an offence for any person convicted at any time of sexual intercourse with a female under fourteen or between fourteen and sixteen (section 146), indecent assault (section 149), aggravated indecent assault (section 149.1), or gross indecency (section 157) to loiter or wander in or near a school ground, playground, public park or bathing area.

b) ANALYSIS

If it is considered acceptable to restrict access to certain public areas to persons convicted of sex offences, then this section is necessary to create the legal restriction. The basic premise, however, may be questionable. It is generally accepted that once a person has served her/his sentence for a crime, whatever the nature of that sentence, she/he has repaid the debt owed and should have her/his rights reinstated. This particular restriction, applying as it does to persons who have at any time committed one of the enumerated offences, creates an exception to the principle. An analogy to this would be to restrict access to banks of any person who at any time had robbed a bank. As inadequate as we know our system of punishment and rehabilitation may be, the mechanism for improving it is not likely to be found in the permanent restriction on movement of persons found guilty of committing a particular crime. In effect what this will mean is that a person found guilty of one of the relevant offences is liable to imprisonment for a stipulated number of years and, in addition to that prison sentence, may never again loiter or wander in or near a school ground, playground, public park, or bathing area. Since public parks and bathing areas are usually established as places for wandering and loitering, this restriction bars people who have been found guilty of these particular offences from the use of such facilities.

The presence in the statutes of laws which permanently restrict the movement of people even after they have served the sentence for a crime needs to be seriously questioned. It is a point much in need of public debate.

4. SOLICITING (CLAUSE 24)

a) EXPLANATION

1972, c. 13, s. 15

24. The said Act is further amended by adding thereto, immediately after section 195.1 thereof, the following section:

Construction

"**195.2** For greater certainty,

(*a*) "prostitution" in section 195.1 means sexual conduct performed by either a male or female person;

(*b*) "public place" in section 195.1 includes any means of transportation located in or on a public place; and

(*c*) soliciting need not be pressing or persistent conduct in order to constitute an offence under section 195.1."

Clause 24 would introduce section 195.2, which clarifies the meaning of soliciting in section 195.1. Section 195.1 provides that it is an offence to solicit any person in a public place for the purpose of prostitution. "Prostitution" may be taken to mean the providing of sexual services for valuable consideration, such as cash or other things having a cash value. Paragraph 195.2(a) defines "prostitution" to mean "sexual conduct performed by either a male or female person", making it clear that the offence of soliciting (engaging in conduct of an importuning nature) in a public place for the purpose of prostitution may be committed by both men and women. Paragraph 195.2(b) defines "public place" in section 195.1 to include any means of transportation located in or on a public place. As a result, soliciting in a motor vehicle which is in a public place would be included in the offence. Paragraph 195.2(c) provides that soliciting need not be pressing

or persistent in order to be soliciting for the purpose of section 195.1.

b) ANALYSIS

These changes effectively overrule a recent decision by the Supreme Court of Canada which held that soliciting must be pressing or persistent to be illegal and that a car is not a public place. This points to the inconsistencies that arise between legislation and judicial interpretation of morality.

In this area, as in others, it is important to clearly specify what we are protecting. There are at least three aspects of soliciting from which we may want protection. One is that if the activity is morally unacceptable and therefore offensive to a person, that person may want to be protected from being confronted by its existence (as Oscar Wilde said in another context, "If such people exist we should be spared the knowledge of them"). Second is the wish to be protected from the unnecessary invasion of privacy which soliciting may involve. And third, protection should be provided against any activity which involves undesired force, harm, or exploitation of any kind.

It has been argued that no one should be publicly confronted with the existence of things they find objectionable. The public exhibition of prostitution, like the public exhibition of obscenity, may be offensive to individuals who would suggest that it be prohibited on that basis. The problem of course is to determine what is to be considered "objectionable" or "offensive" - is it the activity itself, is it the advertising, or is it the process of contracting for the activity? The difficulties of determining what is obscene

have already been dealt with in an earlier part of this paper.

The second argument advanced is that the act of soliciting and the experience of being solicited, by their very nature, invade the individual's right to privacy and should not have to be tolerated. However, having a specific law dealing with soliciting for the purpose of prostitution suggests that this particular purpose of soliciting may be somehow more harmful than other purposes of soliciting. There is no conclusive evidence to this effect and it may be incorrect to confuse moral disapproval with harm for the purposes of the criminal law. There are people who find soliciting for the purpose of conversion or fund raising by religious groups equally or even more offensive than soliciting for the purpose of prostitution. And there are also people who define telephone calls which solicit subscriptions to newspapers as a greater invasion of privacy, in that case, the privacy of one's own home. If the conclusion that soliciting should be legally prohibited is arrived at, then the question arises whether there should be an absolute prohibition or a prohibition of certain forms of soliciting. It could be questioned whether in the case of soliciting, the purpose should be the issue. In other words, perhaps it may be the form or method of soliciting rather than the content that should determine its offensiveness. If this test were applied in determining offensiveness, then passive soliciting would be less offensive than active soliciting regardless of the purpose of the soliciting.

There has not been adequate public debate to ascertain when, if ever, soliciting is an infringement of privacy of sufficient magnitude to justify making it illegal. It must be kept in mind that only if these issues are discussed and resolved can just laws in the area of soliciting be enacted.

Finally, there should be a legal protection against any form of activity that involves force, harm or exploitation. This has already been well established both in law and in common understanding. The problem is to determine who is being forced, harmed or exploited in cases of soliciting - is it the client or is it the "solicitor" or is it both? In addition, one has to understand why force, harm, or exploitation arise. It has been argued that it is the fact of the illegalities surrounding prostitution (prostitution is itself not illegal) which result in the use of force, harm and exploitation. Harassment (physical and psychological) by police and society, payment for protection, blackmail, and the payment of "managers" may be the results of the law rather than conditions inherent to the activity. The decriminalization of laws related to the activity of prostitution could possibly lead to the elimination of exploitation in the area. Finally, laws prohibiting exploitation, force, and harm should be sufficiently all-encompassing to make it unnecessary to identify as crimes activities such as prostitution. Otherwise the criminal law becomes unmanageable and difficult to interpret as a code of conduct.

There are arguments both for and against prostitution itself. These are closely tied into the discussion of the use of the law to prohibit behavior which may be incidental to the act. Although most people would probably not want to promote or encourage prostitution, there seems to be a sufficient demand for it to enable the practice to continue. Prostitution is like other things, at least in part a function of demand. Recent events indicate that the demand for the service being provided by prostitutes is not restricted to any particular class, race, sex or occupational group.

In the best of all possible worlds we may hope that human relations and sexual understanding would be such that the need to buy companionship and sexual fulfilment would not exist. But it is unlikely that anyone would argue that we have achieved that state of human interaction yet.

A great deal of research, public discussion and thought needs to be directed to this area before any change in the present law should be considered or enacted.

5. ABDUCTION OF CHILD BY PARENT (CLAUSE 38)

a) EXPLANATION

38. Section 250 of the said Act is repealed and the following substituted therefor:

Abduction of child under fourteen

"**250.** Every one who, not being the parent or guardian of a child under the age of fourteen years, with intent to deprive a parent or guardian or any other person who has lawful care or charge of that child or the possession of that child, or with intent to steal anything on or about the person of that child, unlawfully takes or entices away, conceals or detains or receives or harbours that child is guilty of an indictable offence and is liable to imprisonment for ten years.

Abduction of child under fourteen by parent

250.1 Every one who, being the parent or guardian of a child under the age of fourteen years,

(*a*) takes or entices away, conceals or detains or receives or harbours that child in contravention of the custody or access provisions of a custody order in relation to that child made by a court anywhere in Canada, or

(*b*) where there is no custody order in relation to that child made by a court anywhere in Canada, takes or entices away, conceals or detains or receives or harbours that child, with intent to deprive a parent or guardian or any other person who has the care or charge of that child of the possession of that child,

unless the parent, guardian or other person from whose care or charge the child was taken or kept had consented to the taking, detention or confinement, is guilty of an indictable offence and is liable to imprisonment for five years for an offence under paragraph (*a*) or to imprisonment for two years for an offence under paragraph (*b*).

Clause 38 would restrict the offence of abduction of a child under fourteen (section 250) to persons who are not the parent or guardian of the child. A new offence of abduction of a child under fourteen by a parent would be created.

Section 250, which makes it an offence for "everyone" to abduct a child under fourteen, would be repealed under the proposed reforms, and a new offence of abduction of a child under fourteen by a person other than a parent or guardian would be introduced. The new offence would be virtually identical to the offence presently contained in section 250 except for two changes. Parents and guardians would no longer be charged under this section, but would be subject to a separate charge under the proposed section 250.1 and concealment would be included in the prohibited modes of abduction.

Section 250.1 would create a new offence of abduction of a child under fourteen by a parent

or guardian. The prohibited modes of abduction would be identical to those in the proposed section 250. The offence would be divided into two categories. Paragraph 250.1(a) would apply when the abduction was contrary to a custody order made in Canada, while paragraph (b) would apply when there was no custody order in force. The maximum penalty of five years' imprisonment would apply in cases where a custody order was in force while a maximum of two years would apply in cases when there was no custody order. The consent of the parent or guardian or any other person who has the care or charge of the child would be a defence to a charge under section 250.1.

Application

250.2 Sections 250 and 250.1 do not apply to a person who takes or entices away, conceals or detains or receives or harbours a child in circumstances where the court is satisfied that the obtaining or retaining of possession of that child by any such means was essential for the welfare of that child, but the court shall not be so satisfied by reason only of the granting of a custody order in favour of the accused after the possession of that child was obtained or retained by any such means.

Section 250.2 would provide that a person charged with abduction of a child would not be guilty of an offence when the abduction was essential to the child's welfare.

Protection of interests of child

250.3 The court before which any proceedings under section 250 or 250.1 are

Section 250.3 would empower the court to appoint the official guardian to represent the interests of any child involved in an abduction. The court could appoint the official guardian where it was of the opinion that

brought may, where it considers it to be in the best interests of the administration of justice and with the consent of the official guardian, direct the official guardian or his agent, through counsel or otherwise, to represent the interests of any child involved in the proceedings.

Definition of "official guardian"

250.4 "Official guardian" in section 250.3 means the official, whether designated by such title or otherwise, who is charged under any law of a province with the duty of safeguarding the interests of children before the courts."

the appointment would assist in the pursuit of justice and with the consent of the official guardian. It is possible that this reform could result in legal representation for children in cases involving abduction.

Section 250.4 defines the words "official guardian" in section 250.3. For the purposes of the appointment of the official guardian in abduction cases, she/he would be a person responsible under any provincial law for safeguarding the interests of children before the courts.

b) ANALYSIS

These amendments are welcome, recognizing as they do the inadequacies of present civil proceedings and recognizing that a child's welfare must be the paramount consideration in determining her/his custody.

ACSW has maintained, in its reports on divorce, on the one-parent family, and on marriage that a child's welfare should be paramount in any family dispute and that to accomplish this children should be accorded the right to independent counsel. It is unfortunate that this amendment only applies in the case of parental kidnapping. ACSW has also expressed a concern with the enforcement of maintenance orders and has recommended that these be strengthened. Although ACSW has not made a specific recommendation in this area,

its previous statements support the premises underlying this reform. The only question that might be raised is the age limit of 14 years placed on the offence. Since custody orders generally are applicable up to the age of 16 years, this might be a more appropriate age limit. Consideration should be given to this. It should also be noted that the creation of this offence and the possibility of imprisonment of a parent may have negative, far reaching effects on the social, economic and personal adjustment of a child. Safeguards may need to be built into the legal process to ensure this doesn't happen.

PART II - AMENDMENTS TO THE CANADA EVIDENCE ACT

1. COMPELLABLE WITNESSES (CLAUSE 153)

a) EXPLANATION

153. Section 4 of the *Canada Evidence Act* is amended by adding thereto, immediately after subsection (3) thereof, the following subsection:

Assaults

"(3.1) The wife or husband of a person charged with an offence against any of sections 203, 204, 216, 218, 219, 222, 223, 228 or 245 or subsection 246(1) of the *Criminal Code* where the victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged."

Under the proposed clause 153 the rule that spouses cannot be forced to testify against each other would be modified. The proposed reform would provide that a person could be called to testify when her/his spouse is charged with one of the specified offences against a victim under fourteen years of age. The specified offences are: causing death by criminal negligence (section 203), causing bodily harm by criminal negligence (section 204), infanticide (section 216), punishment for murder (section 218), punishment for manslaughter (section 219), attempt to commit murder (section 222), accessory after the fact to murder (section 223), causing bodily harm with intent to wound, maim or disfigure (section 228), common assault (section 245), and assault with intent to commit an indictable offence (section 246(1)). These new exceptions to the rule that spouses cannot be forced to testify against each other would

be in addition to other exceptions contained in subsection 4(2) of the Evidence Act, which relate to such things as sexual offences, vagrancy, procuring, abandoning a child and bigamy.

b) ANALYSIS

Little study has been carried out about the effect of crimes within the family, especially those involving children. While action to eliminate child abuse is crucial, the impact on the family unit of one spouse testifying against the other could be damaging. It may result in permanent family breakdown when what is most needed is family therapy. The effect of family breakdown often is most damaging for a woman, who is less able to compete in the labour market. ACSW has expressed the urgent need for unified family courts with accompanying social services (as proposed by the Law Reform Commission of Canada) and has called for their immediate establishment. Until such courts are established, changes in any legal processes relating to family concerns should be viewed with caution (see ACSW recommendations on Unified Family Court, Divorce Law Reform, One-Parent Family, and Statement of the Recognition and Protection of the Rights of Men and Women in Marriage).

Bill C-51

(An Act to Amend the Criminal Code,
the Canada Evidence Act and the Parole Act)

RECOMMENDATIONS
of the
Canadian Advisory Council on the Status of Women
on

OBSCENITY
PROCURING
ABDUCTION OF CHILD BY PARENT
COMPELLABLE WITNESSES

October 1978

(Disponible en français)

INTRODUCTION

On May 1, 1978, the Minister of Justice, the Honourable Ron Basford, introduced Bill C-51, an Act to amend the Criminal Code, the Canada Evidence Act and the Parole Act (the Criminal Law Amendment Act).

This Bill proposes extensive revisions to the Criminal Code in a wide number of areas, including alternative sentencing, pornography, prostitution, parental kidnapping, child abuse/ battered children, loansharking, solicitor/client privilege, drug addicts, pre-trial delay, "wash trading", and abuse of process.

Some of these issues are pertinent to the specific concerns of women. The Canadian Advisory Council on the Status of Women (CACSW) has studied them at length and has presented to the government recommendations on the following subjects:

- obscenity
- procuring
- abduction of child by parent
- compellable witnesses.

OBSCENITY

18. Subsection 159(8) of the said Act is repealed and the following substituted therefor:

Where matter or thing is obscene

"(8) For the purposes of this Act, a matter or thing is obscene where

(a) a dominant characteristic of the matter or thing is the undue exploitation of sex, violence, crime, horror, cruelty or the undue degradation of the human person; or

(b) the matter or thing unduly depicts a totally or partially nude child

(i) engaged or participating in an act or a simulated act of masturbation, sexual intercourse, gross indecency, buggery or bestiality, or

(ii) unduly displaying any portion of his or her body in a sexually suggestive manner.

Definition of "child"

(9) In this section, "child" means a person who is or appears to be under the age of sixteen years.

Forfeiture

159.1 In any proceedings under section 159, where a court is satisfied that a matter or thing is obscene and at any material time was being kept for any purpose prohibited by that section, it shall order the matter or thing to be forfeited to Her Majesty in right of the province in which the proceedings took place, for disposal as the Attorney General may direct."

Clause 18 of Bill C-51 enlarges the definition of obscenity in the Criminal Code.

The exploitation of violence and the representation of children in pornography would be considered obscene under this clause.

The CACSW recommends that this expanded definition of obscenity be approved. The Council is pleased that this added

protection is given to children, preventing them from being used in the manufacture of pornography.

However, although the CACSW approves the intention of this new legislation, it questions whether the application of this legislation will be any more effective than existing legislation, and may produce more problems than it solves.

For example, the term "undue degradation" has no precise definition and it will be necessary to have a number of cases tried in the courts before the meaning of this phrase becomes clear.

PROCURING

20. Section 166 of the said Act is repealed and the following substituted therefor:

Parent or guardian procuring defilement

"166. Every one who, being the parent or guardian of a person,

(a) procures that person to have illicit sexual intercourse with a person other than the procurer, or

(b) orders, is party to, permits or knowingly receives the avails of, the defilement, seduction or prostitution of that person,

is guilty of an indictable offence and is liable to

(c) imprisonment for fourteen years, if that person is under the age of sixteen years, or

(d) imprisonment for five years, if that person is sixteen years of age or more.

Person procuring defilement

166.1 Every one who, not being the parent or guardian of a person under the age of sixteen years,

(a) procures that person to have illicit sexual intercourse with a person other than the procurer, or

(b) orders, is party to, permits or knowingly receives the avails of, the sexual misconduct, defilement, seduction or prostitution of that person,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Belief as to age not material

166.2 For the purpose of proceedings under sections 166 and 166.1, it is not material whether the accused believed that the person in relation to whom the offence was committed was sixteen years of age or more."

The Canadian Advisory Council on the Status of Women recommends that the changes proposed under Clause 20, Section 166, to amend the legislation with reference to the widening of the offence of procuring the sexual misconduct or defilement of children to include the protection of both male and female children equally be approved.

The CACSW recommends the changes proposed in Section 166 c) and d), which raise the minimum age from 14 to 16 years of age in setting out the penalties for parents or guardians. The CACSW agrees with the proposals to provide a more severe sentence for procuring children under the age of sixteen and supports the change of the minimum age from 14 to 16 years of age because it extends the protection of the law to more children.

The addition of the new offence which applies to any person who is not a parent or guardian, who procures a person under the age of sixteen for sexual misconduct, broadens the legislation and provides protection which did not previously exist for children under the age of sixteen. The CACSW recommends the endorsement of this amendment.

ABDUCTION OF CHILD BY PARENT

38. Section 250 of the said Act is repealed and the following substituted therefor:

Abduction of child under fourteen

"250. Every one who, not being the parent or guardian of a child under the age of fourteen years, with intent to deprive a parent or guardian or any other person who has lawful care or charge of that child or the possession of that child, or with intent to steal anything on or about the person of that child, unlawfully takes or entices away, conceals or detains or receives or harbours that child is guilty of an indictable offence and is liable to imprisonment for ten years.

Abduction of child under fourteen by parent

250.1 Every one who, being the parent or guardian of a child under the age of fourteen years,

(a) takes or entices away, conceals or detains or receives or harbours that child in contravention of the custody or access provisions of a custody order in relation to that child made by a court anywhere in Canada, or

(b) where there is no custody order in relation to that child made by a court anywhere in Canada, takes or entices away, conceals or detains or receives or harbours that child, with intent to deprive a parent or guardian or any other person who has the care or charge of that child or the possession of that child,

unless the parent, guardian or other person from whose care or charge the child was taken or kept had consented to the taking, detention or confinement, is guilty of an indictable offence and is liable to imprisonment for five years for an offence under paragraph (a) or to imprisonment for two years for an offence under paragraph (b).

Application

250.2 Sections 250 and 250.1 do not apply to a person who takes or entices away, conceals or detains or receives or harbours a child in circumstances where the court is satisfied that the obtaining or retaining of possession of that child by any such means was essential for the welfare of that child, but the court shall not be so satisfied by reason only of the granting of a custody order in favour of the accused after the possession of that child was obtained or retained by any such means.

Protection of interests of child

250.3 The court before which any proceedings under section 250 or 250.1 are brought may, where it considers it to be in the best interests of the administration of justice and with the consent of the official guardian, direct the official guardian or his agent, through counsel or otherwise, to represent the interests of any child involved in the proceedings.

Definition of "official guardian"

250.4 "Official guardian" in section 250.3 means the official, whether designated by such title or otherwise, who is charged under any law of a province with the duty of safeguarding the interests of children before the courts."

The CACSW recommends that this amendment be accepted and it congratulates the legislators for introducing this measure for the protection and well-being of the child who is the victim of parental conflict.

COMPELLABLE WITNESSES

153. Section 4 of the Canada Evidence Act is amended by adding thereto, immediately after subsection (3) thereof, the following subsection:

Assaults

"(3.1) The wife or husband of a person charged with an offence against any of sections 203, 204, 216, 218, 219, 222, 223, 228 or 245 or subsection 246(1) of the Criminal Code where the victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged."

The CACSW recommends that this amendment to the effect that one spouse may be forced to testify against the other when the victim of the crime is under the age of 14 in specified crimes be approved.

An individual can more easily engage in an illegal act against a child in front of his/her spouse, or with the knowledge of the latter, if he/she knows in advance that his/her spouse may not testify against him/her.

The CACSW believes, in fact, that spouses, being equal, should accept their responsibilities, i.e. they should not have to be afraid that their testifying will be prejudicial to themselves. It is a matter of protecting a young child from voluntary complicity following on an illegal act committed against that child.

A choice has to be made here between protecting the marital relationship and the protection of children. The CACSW has chosen to put the welfare of the child first.

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